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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

In 1863, there was no legal presumption that "person" included local governments for purposes of statutory construction. Moreover, because local governments were not recipients of federal funding, there was no need for Congress to include them as "persons" when enacting the 1863 Act. Indeed, by including criminal provisions in the 1863 Act, Congress necessarily excluded local governments from its liability provisions. Understandably, there are no reported cases of local governments being sued prior to the FCA's 1986 amendments. When, in 1986, Congress amended the FCA to add punitive damages, local governments still were not "persons." *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) ("person" has not changed since the 1863 Act). In any event, Congress' imposition of mandatory punitive damages, without a clear expression that such damages were to apply to local governments, effectively immunized local governments from FCA liability. The policy considerations for not imposing punitive damages on local governments are obvious—innocent citizens bear the brunt of such damages either through an increase in taxes or a decrease in needed services. The Court's reasoning in *Stevens* that "various features of the FCA, both as originally enacted and as amended," indicate that States are not subject to the FCA, *id.* at 787, compels a like conclusion that local governments are not subject to the FCA.

I. THERE IS NO EVIDENCE THAT THE 1863 ACT SUBJECTED LOCAL GOVERNMENTS TO LIABILITY.

1. Respondent, Relator, urges the statutory construction of the 1863 Act adopted by the court of appeals, Pet. App. 8a, in which a presumption is applied to the word "person," as used in Congressional enactments, to include local governments. "Presumption" is a potent concept. Neither a

"non-controversial proposition," Resp. Br., 13, 20, nor a "contemporaneous understanding" of the suability of municipal corporations, U.S. Br., 12 n.4, translates into a "presumption."

Relator cites a number of nineteenth century cases in which local governmental bodies were sued in contract or tort, none of which, with the exception of *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869), interprets the meaning of "person" as used by Congress. Therefore, those cases shed no light on the issue before the Court, whether Congress, by using the term "person," subjected local governments to liability under the 1863 Act.

The authorities cited by Relator demonstrate no more than that the law was still evolving prior to the Court's decision in *Cowles*. *See, e.g., Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 586, 673 (1978) (noting that "*Board of Comm'rs v. Aspinwall*, 24 How. 376 (1861), [was] the first of many cases upholding the power of federal courts to enforce the Contract Clause against municipalities"). By 1863, "the state courts did not speak with a single voice with regard to the tort liability of municipal corporations . . . [and] no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons." *Monell*, 436 U.S. at 720-21 (Rehnquist, J., dissenting); *see also Owen v. City of Independence, Mo.*, 445 U.S. 622, 639 (1980) (noting that, although, in 1871, "[l]ocal governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, . . . a municipality was not subject to suit for all manner of tortious conduct").[1]

[1] Relator argues that nothing happened between 1863 and the *Cowles* decision in 1869 to lead to the extension of the meaning of "person" to include local governments. Resp. Br., 12. Actually, a great deal happened. The Civil War ended, and the Reconstruction period began. The Thirteenth, Fourteenth, and Fifteenth Amendments became law between 1865 and 1870. To enforce the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1871, which subjected local governments to liability. *See Monell*, 436 U.S. at 665, 685-86.

In contrast, by the time Congress enacted the Civil Rights Act of 1871, local governments were considered "persons" for purposes of statutory construction both under the Court's 1869 decision in *Cowles* and by Congress' 1871 enactment of the Dictionary Act. Act of Feb. 25, 1871, § 2, 16 Stat. 431. Yet, in holding that local governments were subject to liability under Section 1983 of the Civil Rights Act, the Court in *Monell* did not rely solely on a "presumption" that local governments were "persons" in 1871. Rather, the Court also considered the legislative history for indications of Congressional intent, the general treatment of municipal corporations in 1871, and the Dictionary Act. *See Monell*, 436 U.S. at 686-89. As Cook County explained in its initial brief, Pet. Br., 13-19, applying those same considerations to the 1863 Act leads to the conclusion that the term "person" did not include local governments. *See United States v. Erie County Med. Ctr.*, 02-CV-0305 E(Sr), 2002 U.S. Dist. LEXIS 22673, at *17 (W.D.N.Y. Oct. 30, 2002).

2. The United States argues that local governments "are as capable as natural persons or commercial corporations of submitting false claims for payment to the federal government" and thereby threaten the federal fisc. U.S. Br., 15. Notably, the United States nowhere explains under what circumstances local governments could have done so in 1863, or, for that matter, whether local governments were receiving any money from the federal government in 1863.

Relator equates municipal corporations with private corporations, which were presumptively included within the term "person" by 1863. Resp. Br., 15-22. In a broad sense, the term "corporation" applies to any body politic and corporate, including even the United States. *See Ngiraingas v. Sanchez*,

495 U.S. 182, 202 and n.8 (1990) (Brennan, J., dissenting) (citations omitted). However, Congress does not always use the term in its broadest meaning. Generally, statutes make clear, either through express language or clear implication, whether they refer to municipal or other kinds of corporations, or to both.[2] When a statute is not specific as to Congress' intent regarding the scope of the term "corporation," the Court has looked to other factors to determine the legislature's intent. *See, e.g., City of Lincoln v. Ricketts*, 297 U.S. 373, 374, 376-77 (1936) (examining Bankruptcy Act for legislative intent before concluding that "corporation" was being used in a broad sense to include municipal corporations); *contrast Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-09 (1993) (despite inclusion of "association" in Dictionary Act's definition of "person," Court found that certain features of *in forma pauperis* statute suggested that Congress only intended for natural persons to proceed under that statute). In neither *Cowles* nor *Monell* did the Court equate public corporations with private corporations as early as 1863. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262 (1981) (distinguishing between municipal and private corporations) (citing *Hunt v. City of Boonville*, 65 Mo. 620, 625 (1877)).

In the early and mid-nineteenth century, the law regarding the corporate structure of local governments was evolving differently in the different states, with some local governments considered municipal corporations and others quasi-corporations. *See* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U.L. Rev. 369, 372, 392-410 (1985). The liability

[2] Neither Relator nor her *amici curiae* disputes that many statutes, such as those listed in Pet. Br., 26-27, Airport Proprietors Br., 12-13, and Orange County Br., 7 n.4, demonstrate that Congress makes its intention clear when it wishes to include local governments within the purview of a statute.

of municipal corporations, "made such by acceptance of a willage or city charter," was greater than that of involuntary quasi-corporations, "known as counties, towns, school-districts, and especially the townships of New England." *See Barnes v. District of Columbia*, 91 U.S. 540, 552 (1875).[3] Moreover, in the mid-nineteenth century, Congress was aware that even private corporations were not treated as "persons" for all purposes. *See Monell*, 436 U.S. at 720 (Rehnquist, J., dissenting) (noting that while private corporations were "citizens" for purposes of Article III, they were not for purposes of the Privileges and Immunities Clause) (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869)).

Both Relator and the United States argue that *Cowles* did not change the law because the question was "non-controversial," Resp. Br., 20, and because *Cowles* did not overrule a prior understanding. U.S. Br., 11. The pre-*Cowles* cases upon which Relator and the United States rely do nothing more than show what the law was for certain purposes in certain states, which is insufficient to establish a "presumption" that the word "person" included local governments for purposes of Congressional enactments as early as 1863. Indeed, it was not until the *Cowles* decision in 1869 that the Court first held that local governments could be treated as natural persons. *See Erie County*, 2002 U.S. Dist. LEXIS 22673, at *13.

The United States, U.S. Br., 13, points to the Court's comment in *Stevens* that corporations were "presumptively

[3] Relator hastily concludes that Cook County was a "full-blooded 'corporation' as of 1863." Resp. Br., 17 n.3. In fact, the distinction between municipal corporations and quasi-corporations existed in Illinois, and, as late as 1924, the Illinois Supreme Court explained that, in contrast to municipal corporations, which existed at the request of the people, counties were involuntary quasi-municipal corporations, "rank[ed] low in the scale or grade of corporate existence." *County of Cook v. City of Chicago*, 311 Ill. 234, 239-41 (1924).

covered by the term 'person.'" *Stevens*, 529 U.S. at 782 (emphasis in original) (citing 1 U.S.C. § 1). Because the presumption that municipal corporations are embraced in the word "person" for purposes of statutory construction did not exist in 1863, *see Erie County*, 2002 U.S. Dist. LEXIS 22673, at *17 n.19, the Court's reference in *Stevens* to "corporations" in the Dictionary Act is limited to private corporations. Indeed, quoting *United States v. Bornstein* for the proposition that "the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War,'" the Court in *Stevens* added "private" to make clear that private corporations, not public ones, were targeted by Congress in the 1863 Act. *See Stevens*, 529 U.S. at 781 (quoting *Bornstein*, 423 U.S. 303, 309 (1976)). Moreover, the 1863 Act itself specifically referenced an "officer or agent of any banking or other commercial corporation, and . . . member of any mercantile or trading firm," barring such individuals from employment by the United States "for the transaction of business with such corporation or firm." Act of Mar. 2, 1863, ch. 67, § 8, 12 Stat. 696, 698-99. Pet. Br. App. 36a. Clearly, Congress itself made a distinction in the 1863 Act between municipal and commercial corporations.

There was no presumption by 1863 that local governments were included in the term "person" in Congressional enactments or that all local governments had a uniform corporate identity that equated with a private corporation. Thus, the term "person" in the 1863 Act did not presumptively include local governments.

3. Even if the Court finds that the term "person" presumptively included local governments in 1863, the mandatory criminal penalties imposed under the 1863 Act establish that Congress did not intend that presumption to apply to the 1863 Act. Relator and the United States contend that this argument proves too much, noting that, just as a local

government cannot be imprisoned, neither can a private corporation. Resp. Br., 23; U.S. Br., 13. However, it is the fact that a local government cannot be subject to any criminal penalty that distinguishes it from a private corporation. Thus, contrary to Relator's and the United States' assertions, the County's interpretation of the 1863 Act does not exclude private corporations from liability.

Federal crimes are created solely by statute, as opposed to common law. *See United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812). The 1863 Act "made it a criminal offense for any person, whether a civilian or a member of the military services," to present upon the United States any claim for payment "'knowing such claim to be false, fictitious or fraudulent.'" *Hubbard v. United States*, 514 U.S. 695, 704 (1995) (quoting 1863 Act). Among other things, Section 1 of the 1863 Act provided that any person who "shall steal, embezzle, or knowingly and willfully misappropriate" shall be subject to criminal punishment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 697. Pet. Br. App. 33a. Not only did the 1863 Act impose an actual knowledge of fraud and/or willfulness element, in other parts of Section 1, it also imposed an "intent to defraud" and "intent to cheat" element. *Id.* at 696-97; Pet. Br. App., 33a; *see also United States v. Jennison*, 26 F. Cas. 608, 610 (Cir. Ct., D. Kan. 1874) (No. 15475) (judge charging jury that under 1863 Act they must find that defendant intended to defraud government); *Kurzrok v. United States*, 1 F.2d 209, 211 (8th Cir. 1924) (rejecting defendant's contention that there was insufficient evidence upon which jury could have found that defendant "intended to defraud the United States" in violation of FCA); *United States v. Griswold*, 24 F. 361, 365 (D. Or. 1885), *aff'd* 30 F. 762 (Cir. Or. 1887) ("A forfeiture cannot occur under section 5438, Rev. St. [codification of criminal provision of 1863 Act], without the party incurring the same being guilty of both fraudulent intent and conduct."); *United States v. TDC Mgt. Corp., Inc.*, 24 F.3d 292, 297

(D.C. Cir. 1994) (intent to deceive is element of fraud under pre-1986 version of FCA).[4] As local governments were not thought capable of forming criminal intent, the word "person" in the 1863 Act cannot sensibly be interpreted to include local governments. *See City of Newport*, 453 U.S. at 264 n.23 (quoting G. Field, Law of Damages § 80 (1876)) ("'[Municipal corporations] cannot . . . be supposed capable of doing a criminal act.'").[5]

While the 1863 Act originally provided both criminal and civil sanctions in the same statute, those provisions were subsequently bifurcated. *Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958). In the Revised Statutes of 1878, the civil sanctions were codified as Sections 3490-3494 and the criminal sanctions as Section 5438. *Id.*[6] The Court has narrowly interpreted Section 5438 of the Revised Statutes, which was largely a re-enactment and codification of Section 1 of the 1863 Act. *See United States ex rel. Marcus v.*

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[4] In 1986, Congress amended the FCA so that "proof of specific intent to defraud" was no longer required, making it easier for the federal government and relators to prevail. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 976 (7th Cir. 2002) (citing 31 U.S.C. § 3729(b)). Pet. App. 12a-13a.

[5] Even RICO's expansive reach, Resp. Br., 25, does not extend to local governments, which cannot form the requisite intent. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (civil RICO claim against public hospital fails "because government entities are incapable of forming a malicious intent," an element of the predicate criminal act); *Albanese v. City Fed. Sav. and Loan Ass'n*, 710 F. Supp. 563, 567 (D.N.J. 1989) (township cannot form criminal intent to commit predicate acts and thus cannot be held liable under civil RICO statute).

[6] Section 5438, titled Crimes, made certain acts to defraud the United States crimes punishable by imprisonment or fine, while Section 3490 made the violation of Section 5438 subject to forfeitures of $2,000 per false claim and double damages. *Rainwater*, 356 U.S. at 592 n.8; *see also Bornstein*, 423 U.S. at 306.

Hess, 317 U.S. 537, 542 (1943) ("§ 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included"); *United States v. McNinch*, 356 U.S. 595, 598 (1958) (noting that in construing Section 5438 it is "actually construing the provisions of a criminal statute" and that "[s]uch provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible [of] numerous definitions"); *see also Rainwater*, 356 U.S. at 592-93.

This same reasoning would not have excluded private corporations from liability under the 1863 Act. While both local governments and private corporations cannot be imprisoned, a private corporation, unlike a local government, can be held criminally liable. *See, e.g., New York Central R.R. v. United States*, 212 U.S. 481, 492-94 (1909). Indeed, as the United States correctly points out, a corporation was held to be a person subject to a penal statute as early as 1826. U.S. Br., 10 n.3 (citing *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412-13 (1826)). Moreover, Section 8 of the 1863 Act provided that "no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm . . . shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm." Act of Mar. 2, 1863, ch. 67, § 8, 12 Stat. 696, 698-99. Pet. Br. App. 36a. By its express terms, a violation of Section 8 occurred simply by virtue of the conflict of interest with no showing that the corporation submitted a false claim to the United States. *Cf. United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549-50 (1961) ("the statute [restatement of Section 8 of 1863 Act] is more concerned with what might have happened in a given situation than with what actually happened"). That Congress would have prohibited conflicts of interest in

transactions between commercial corporations and the United States but not have prohibited commercial corporations from submitting false claims defies common sense.

Thus, even if the Court finds that the term "person" presumptively included local governments in 1863, the criminal context in which the term was used in the 1863 Act overcomes that presumption.

4. Recognizing that "person" has remained in the FCA unchanged since 1863, *see Stevens,* 529 U.S. at 783 n.12, the United States cites the FCA's 1982 amendments for the proposition that they "reinforce" the conclusion that Congress, in 1863, intended local governments to be subject to the 1863 Act. The United States bases this proposition on *Monell*'s holding that local governments were persons under Section 1983 as well as the Court's holdings that the FCA covered all forms of fraud against the United States and that the damages available at that time were compensatory. U.S. Br., 15-16. The United States reads too much into the 1982 amendments.

First, *Monell*'s holding is limited to Section 1983, enacted eight years after the 1863 Act. Second, while the 1863 Act was intended to cover all types of fraud, it was not "intended to cover all types of *fraudsters.*" *See Stevens,* 529 U.S. at 781 n.10 (emphasis in original). Third, the Court's holdings regarding the FCA's double damages are not controlling because those damages simply provided the federal government with full compensation, not punitive damages. Finally, as the Court in *Stevens* noted, "[i]n 1982, Congress made a housekeeping change" which resulted in the incorporation of "the term of art 'member of an armed force' throughout Title 10 of the United States Code." *Stevens,* 529 U.S. at 782. Therefore, the 1982 amendments neither create a presumption nor reinforce that local governments were included as "persons" under the 1863 Act.

If anything, by not explicitly expressing an intent to subject local governments to liability, the amendments to the FCA in 1982, as well as in 1986, in fact, reinforce that "person" in the 1863 Act never included local governments. Indeed, Congress' imposition of mandatory punitive damages in 1986, from which local governments are immune, further confirms that the term "person" in the FCA does not include local governments. *See Erie County*, 2002 U.S. Dist. LEXIS 22673, at *20-21.

5. A more compelling indication that Congress subjected local governments to liability under the 1863 Act would be a history of lawsuits brought against local governments. However, none exists prior to the 1986 amendments. Neither of the two matters that Relator cites, Resp. Br., 32, establishes that local governments were sued, let alone held liable, under the FCA prior to the enactment of the 1986 amendments. *United States v. Bd. of Educ. of City of Union City* was a suit for violations of the FCA, common law fraud, breach of contract, unjust enrichment, and conversion brought against multiple defendants, including a number of individuals who had been convicted for the same conduct. Civil Action No. 83-2651, 1985 U.S. Dist. LEXIS 14917 (D.N.J. 1985). It is not clear under which cause of action the Board of Education was being sued; however, insofar as the Board of Education, as a third-party plaintiff, attempted to join in the United States' summary judgment motion on the FCA claims against the individual defendants, *id.*, it seems extremely unlikely that the United States was pursuing an FCA claim against the Board of Education. *United States v. Escondido Union Sch. Dist.,* No. 78-0845-S (S.D. Cal.), has no opinion from which one can glean the cause of action brought against the defendant School District or whether the question regarding a local government's status as a "person" under the FCA was raised. Notably, the United States has not commented on either of these cases.

II. THERE IS NO EVIDENCE THAT CONGRESS INTENDED TO IMPOSE THE FCA'S PUNITIVE DAMAGES ON LOCAL GOVERNMENTS.

The Court presumes "that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Therefore, when, in 1986, Congress increased the FCA's civil remedy from double to treble damages and the fines from $2,000 to between $5,000 and $10,000, it knew that the double damages of the FCA were not punitive. *Marcus*, 317 U.S. at 550; *Bornstein*, 423 U.S. at 531 n.11. Congress also knew that treble damages, like those in the antitrust laws, would have been punitive. *Stevens*, 529 U.S. at 785-86 (citing *Marcus*, 317 U.S. at 550); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct").[7] Congress also knew that the Court recognized a long-standing immunity from the imposition of punitive damages against governmental entities and that Congress must expressly manifest its intention to abrogate the immunity. *City of Newport*, 453 U.S.

[7] That treble damages can be assessed against local governments under the antitrust laws does not compel a different result. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978). In *City of Lafayette*, the Court determined that the antitrust laws were drafted with the purpose of reaching all commercial activity, including a municipality's commercial activity. *Id.* at 408 ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established."). "The [FCA] and the antitrust laws are not analogous in this regard" because the FCA does not have "the same broad scope as the antitrust laws." *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002).

at 259, 260 n.21, 263. Finally, Congress knew that the United States had remedies other than the FCA to recover damages from local governments. Thus, Congress was aware of the consequence of trebling the damages with no indication of an intent to impose the mandatory damages on local governments.

1. Relator downplays the punitive nature of the FCA's mandatory treble damages plus fines plus relator's attorneys fees, arguing that the increase "was necessary to assure full compensation to the federal government" since the percentage paid to relators was increased. Resp. Br., 39. However, unlike the double damages at issue in *Marcus*, 317 U.S. 537, or *Bornstein*, 423 U.S. 303, under the 1986 amendments, the federal government's share of the damages far exceeds the amount necessary to make it whole. Even though a relator may receive up to 30% of both the treble damages and fines, the federal government receives in excess of double the damages. Where the United States brings an action itself, it receives the full treble damages plus fines. The rationales of *Marcus* and *Bornstein*, thus, do not justify the windfall to the United States under the current mandatory treble damages.

Relator also argues that Congress intended the treble damages to be compensatory, but "ultimately settled on the simpler scheme of treble damages." Resp. Br., 38. Simpler or not, the FCA's damages are punitive. *See Stevens*, 529 U.S. at 784-85. "[I]t is the function of the courts and not the Legislature . . . to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). For example, it is safe to assume that Congress always intends to enact a constitutional statute, but that well-meaninged intent does not prohibit the Court from holding that an enactment is unconstitutional. Likewise, even if Congress considered the treble damages scheme in the 1986 amendments to be compensatory, the Court in *Stevens* has determined otherwise.

Relator's distinction between "common-law punitive damages" and treble damages that are "essentially punitive in nature," Resp. Br., 44-45, leads nowhere. "Punitive damages, by definition, are damages in excess of those necessary to provide recompense." Brief for the United States as *Amicus Curiae* at *16, *Barnes v. Gorman* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit) (No. 01-682). Whether punitive damages are imposed against a local government by a jury award or by a mandatory punitive damages scheme, the result is the same: they punish "only the taxpayers, who took no part in the commission of the tort . . . and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *City of Newport*, 453 U.S. at 267.

2. By using terms such as "sub silentio," "repeal," Resp. Br., 32, 33, "oust," U.S. Br., 17, and "remove," K&R Br., 8,[8] Relator and her *amici curiae* ask the Court to invert the well-established standard for the imposition of punitive damages on local governments from one requiring an explicit indication of abrogation from Congress to one requiring a mere inference. *See, e.g., Barnes v. Gorman*, 122 S. Ct. 2097, 2103 (2002) (Stevens, J., concurring) ("absent clear congressional intent to the contrary, municipalities are not subject to punitive damages") (citing *City of Newport*, 453 U.S. 247); *Owen*, 445 U.S. at 704 ("immunities 'well-grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language'") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). To begin with, since local governments were not "persons" under the 1863 Act, there was nothing in

[8] The Taxpayers Against Fraud further argue that the 1986 amendments changed the meaning of "person" to broaden it and that the FCA's treble damages are not punitive. Taxpayers Br., 9, 12-23. Those arguments run directly counter to the Court's conclusions in *Stevens*. *Stevens*, 529 U.S. at 783 n.12, 784-85.

1986 to "oust" or "repeal." Moreover, the inferences that Relator and her *amici curiae* have pressed do not indicate any Congressional intent to impose punitive damages on local governments.

The Senate Committee Report's citation to *Smith v. United States*, 287 F.2d 299 (1961), Resp. Br., 32, does not constitute a clear expression of Congressional intent to impose punitive damages on local governments. In *Smith*, the executive director of a governmental housing project was convicted under the FCA. *Id.* at 300. Not only does *Smith* have nothing to do with liability of local governments under the FCA, the Senate Report did not cite *Smith* for Relator's proposition that Congress understood that local governments could violate the FCA. S. Rep. No. 99-345, at 18-19, *reprinted in* 1986 U.S.C.C.A.N. at 5283-84.

Nor does Congress' 1985 increase of damages for false claims involving contracts with the Department of Defense infer a Congressional intent to impose punitive damages on local governments. U.S. Br., 25-26. In 1985, Congress decided that some fraudsters could be held liable for double damages under the FCA and others for treble damages under the Department of Defense Authorization Act. Also, in 1985, Congress first proposed to add mandatory treble damages to the FCA for all fraud claims. 131 Cong. Rec. 22,322 (1985). Thus, Congress' adoption of a treble damages scheme in the FCA to comport with the same scheme under the Department of Defense Authorization Act, *see* S. Rep. No. 99-345, at 17, *reprinted in* 1986 U.S.C.C.A.N. at 5282, is not an explicit indication of Congressional intent to impose the FCA's punitive damages on local governments.

The United States' argument that, given "Congress's overriding intent to strengthen and expand" the FCA, it is "unlikely" that Congress would have exempted local governments from the 1986 amendments, U.S. Br., 19, is particularly curious in light of the position it took earlier this year

in another case before the Court. There, the United States, as *amicus curiae*, argued: "A court should not impute to Congress an intent to allow a punitive damages remedy absent a clear congressional directive," and even when "punitive damages are found to be available in certain circumstances, this Court has declined to recognize a punitive damages remedy against municipalities." Brief for the United States as *Amicus Curiae* at *7, *17, *Barnes v. Gorman* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit) (No. 01-682). In that case, the United States correctly stated: "the Court in *Fact Concerts* did not presume that punitive damages were available against municipalities unless Congress said otherwise, . . . Instead, in *Fact Concerts*, the Court first looked to whether there was any evidence that in enacting Section 1983, Congress had intended to override the 'common-law tradition' that punitive damages were not available against a municipality." *Id.* at *17 (citing *City of Newport*, 453 U.S. at 261). The United States' position in *Barnes v. Gorman* that "the proper presumption in the absence of clear Congressional guidance is against inference of a punitive damages remedy," *id.* at *11 (heading for its first argument), is directly applicable to this case. Without a clear indication from Congress that the FCA's punitive damages are to be imposed on local governments, the federal government is left to resort to more traditional causes of action against local governments.

As for the whistleblower provision, it is not at all implausible that Congress may have subjected local governments to liability for retaliation but not for submitting a false claim. Relator ignores the range of other actions that could be taken by the United States against a local government in response to disclosures of fraud, such as threatening the withdrawal of federal funding, which can be the death knell of a program. Thus, that local governments may be subject to retaliation liability under 31 U.S.C. § 3730(h) does not lead to the

inexorable conclusion that they may also be subject to liability for submitting a false claim.

Relator's *amicus curiae*, K&R Limited Partnership, cites a line of cases holding that an employee must show a distinct possibility that a viable FCA suit can be brought against her employer to state a claim for retaliation under Section 3730(h). K&R Br. 19. However, the only courts to have considered whether a local government is an "employer" under Section 3730(h) held that a local government could be sued for retaliating against its employee, despite the fact that it cannot be sued for submitting a false claim. In *United States ex. rel. Satalich v. Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Ca. 2001), the court, after observing that the whistleblower provision applied to "any" employer, explained:

> While it may seem unlikely that a non-target employer would engage in retaliatory conduct, this case demonstrates the propriety of interpreting section 3730(h) literally, and permitting the action to go forward. Specifically, this case presents a circumstance where an employer without FCA liability could be in cahoots with other non-municipal entities that are potentially liable, and for that reason may be motivated to silence a whistleblower. Moreover, the remedies provision of section 3730(h) does not impose punitive damages. Thus, the Court is not confronted with the considerations of history and policy which support municipal immunity from section 3729 liability. Given the obvious policy considerations that underlie the enactment of section 3730(h), the Court concludes that Plaintiff should be

> permitted to maintain this action, irrespective of whether the City bears any potential liability under section 3729.

Id. at 1107-08; *see also Erie County*, 2002 U.S. Dist. LEXIS 22673, at *13.[9] As Cook County argued in its initial brief, Pet. Br., 30, the Senate Committee Report's definition of "employer" in the whistle-blower provision, upon which Relator places great reliance, Resp. Br., 31, is too thin a reed to support a finding that Congress abrogated the common-law local governmental immunity from punitive damages. *Cf. United States ex rel. Long v. SCS Business and Technical Inst.*, 999 F. Supp. 78, 93 (D.D.C. 1998), *rev'd on other grounds*, 173 F.3d 890 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000) ("Congress' intent to protect whistleblowers does not extend to whistleblowers whose employer is a state because Congress did not clearly state such intention in the statute, even if the legislative history suggests such an intention.").

Neither Cook County nor its *amici curiae* have suggested that local governments cannot be held accountable for fraud upon the United States. The FCA, however, with its punitive damages, is not the appropriate remedy for fraud committed by a local government in its use of federal funds. Nothing about the real punishment inflicted by the FCA is "hyperbolic." Resp. Br., 46. Funds used to satisfy a punitive damages judgment against a local government necessarily means less money to spend on schools, hospitals, airports, roads, and numerous other programs and services provided by local governments. Thus, the burden of the FCA's punitive damages is felt by innocent people throughout this country, from school children to the medically indigent to the users of

[9] As in *Satalich*, Relator, here, alleges that Cook County was in cahoots with its co-defendant, the Hektoen Institute for Medical Research ("Hektoen"), a suable entity under the FCA. Because Hektoen employed Relator, her retaliatory discharge claim against Cook County was dismissed. Pet. App. 48a.

public airports, to name but a few. These innocent victims of the FCA's punitive damages have no means of "avoid[ing] such dilemmas." Resp. Br., 46. While Congress has the power to impose punitive damages on local governments, the Court has always required a clear indication of Congressional intent. No clear indication exists anywhere in the history of the FCA of a Congressional intent to subject local governments to liability under the FCA, much less punitive damages.

Consistent with the Court's analyses in *Stevens* and *City of Newport,* the Court should reverse the judgment of the court of appeals.

CONCLUSION

For the reasons set forth above and in Petitioner's Brief, as well as for the reasons set forth in the briefs filed by the *amici curiae* in support of the Petitioner, Cook County, Illinois, the court of appeals' decision should be reversed.

Respectfully submitted,

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